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No. 95-748

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

HANS HOECK,

Petitioner,

v.

CITY OF PORTLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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January 12, 1996

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RESPONDENT'S BRIEF IN OPPOSITION

Petitioner Hans Hoeck asks this Court to review the ruling of the Ninth Circuit Court of Appeals upholding the City of Portland's demolition of his derelict building. The

Court of Appeals Opinion is reported at 57 F.3d 781 (1996). The Court should deny the petition. Hoeck asks the Court to review a federal question that was not before the Ninth Circuit, that is, whether the City's actions violated the Takings Clause of the Fifth Amendment to the United States Constitution. In addition, Hoeck's petition misportrays the facts of this case.

STATEMENT OF THE CASE

In 1984, Hans Hoeck bought a vacant six-story structure commonly known as the Bridgeport Hotel on Burnside Avenue, a main thoroughfare running east and west through downtown Portland, Oregon. During 1984 and 1985, Hoeck made plans to gut the structure, add four floors, and convert it to an office building.

Hoeck received a City of Portland building permit for his project in the spring of 1985 and commenced work. Over the next three months he gutted the structure, supplemented the foundation, and added steel superstructure for an additional four floors.

In July, 1985, the City caused work on the site to be restricted after determining that Hoeck needed to obtain additional land use approvals to raise the building by four floors. Those land use approvals and revised building permits were granted in early February, 1986, so that construction could recommence.

During this same time, State Federal Savings and Loan, from which Hoeck had received a commitment for permanent financing for the renovation project, was declared

insolvent. Its operations were taken over by the Federal Savings and Loan Insurance Corporation (FSLIC) and later by the Federal Deposit Insurance Corporation (FDIC). In early March, 1986, FDIC disavowed the State Federal Savings and Loan financing commitment to Hoeck.

Hoeck tried unsuccessfully to obtain substitute financing. In the mean time, construction work on the Bridgeport project ceased and it stood uncompleted and unoccupied.[1] The appendix contains photographs of the structure taken in 1989, which were part of the administrative and judicial record below.

For three years, the Bridgeport stood vacant, half built, and open to the elements. Finally, after receiving complaints from neighbors, the City's Bureau of Buildings commenced administrative proceedings under the City Code against the structure as an abandoned and dangerous building.[2] The Buildings Bureau asked that Hoeck be required either to complete the Bridgeport Hotel structure or remove it. As

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[1] The record does not support Hoeck's suggestion that the City "caused the building to become abandoned" because it caused Hoeck's financing to fall through. Petition for Certiorari at 17. The record shows the contrary. The City did suspend Hoeck's building permit in mid-1985, when it determined that the permit had been improperly granted. But the City had granted a new, proper permit by February, 1986. Hoeck's financing was not withdrawn until March, 1986.

[2] Portland City Code provides that the City may, after notice and opportunity for hearing, order restoration or demolition of abandoned or dangerous structures. Portland City Code Chapter 24.55. Petitioner's Appendix, G-1 to G-5.

required by code, the case was assigned to a Code Hearings Officer for hearing.

The first of six administrative hearings was held in June, 1989. Mr. Hoeck was represented by counsel. Among other things, the Hearings Officer found that:

> The structure was open to entry and was a harbor for vagrants and criminals. Repeated and regular police action was required to remove unauthorized persons from the premises and to deal with criminal and other illegal activities within the structure.
>
> The interior of the structure contained large amounts of trash, debris, and human waste products which presented a hazard to persons in and about the structure, including police and other emergency personnel required to enter the structure.
>
> All windows had been removed... which presented a fall hazard to persons within the structure, including police and other emergency personnel .... The absence of windows also allowed weather entry into and deterioration of the structure and allowed the entry of vagrants, criminals, and trespassers.
>
> Numerous holes had been cut in the structure's floors which were open and unguarded and which presented a fall hazard to person in the structure, including police and other emergency personnel....
>
> The plumbing fixtures had been removed and the drains were open creating a risk of sewer gases entering from the open drains. This ...[was] both a

> health and fire hazard to persons in and around the structure.
>
> The concrete support beams had been broken and the reinforcing steel exposed and rusted. The existing steel structure of the building was rusted and deteriorated. This present[ed] a hazard of collapse or failure under adverse conditions such as earthquake or fire.

Hearings Officer's Order, November 24, 1989, Petitioner's Appendix, F-6 to F-7.[3]

The Hearings Officer found that the numerous building code and safety violations at the Bridgeport "present[ed] an immediate hazard to the health, life, and safety" of persons in and around the building. Hearings Officer's Order, June 2, 1989, Petitioner's Appendix, F-4. He directed Hoeck to take a number of steps to secure the structure from entry, to police the structure to prevent unauthorized entry, to "improve [its] safety and sanitation ... and to reduce and ameliorate its deleterious effect on the surrounding neighborhood...." *Id.*, Petitioner's Appendix, F-3.

The second hearing before the Hearings Officer occurred in November, 1989. The Officer found that although Hoeck had taken some steps consistent with the June, 1989, order, he had failed to remedy many of the violations. The Hearings Officer found that the structure "remains in a

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[3] The order from the November, 1989, hearing contains findings and conclusions covering both the June and November, 1989, hearings.

dangerous and abandoned status." Petitioner's Appendix, F-7. The Hearings Officer imposed a civil penalty against Hoeck of $500 and directed him to comply with the earlier order. He did not, however, order the building demolished. Instead, he continued the hearing again to February, 1990, to allow Hoeck time to arrange to complete the building. Petitioner's Appendix, F-12.

On March 1, 1990, another hearing was held. Mr. Hoeck was still in violation of the earlier orders and presented no plans or financing arrangements to do anything with the Bridgeport. The building stood, as it had for four years, an empty carcass, dangerous, and derelict, a haven for drug abuse and crime. The Hearings Officer affirmed his findings that the structure was abandoned and dangerous and ordered its demolition within 90 days. Hearings Officer's Order of March 1, 199O, Petitioner's Appendix, F-15.

Hoeck, as allowed by Oregon law, filed a Writ of Review in Multnomah County Circuit Court, challenging the Hearing Officer's decision. Among other things, Hoeck argued that his due process rights under the Fourteenth Amendment to the United States Constitution had been violated. *Hoeck v. City of Portland*, Multnomah County Circuit Court No. 9005-02917, First Amended Petition for Review, (July 3, 1990), ¶s 16, 17, 18, 19, 20. He did not, however, assert that the order to demolish the building constituted a "taking" under either the federal or state constitutions. The Circuit Court denied the writ and issued a judgment affirming the Hearing Officer's demolition order. The judgment was signed October 26, 1990. Petitioner's Appendix, E-1 to E-2. Hoeck did not appeal that judgment. The Bridgeport was still standing at that time, nearly 18

months after the City initiated its first administrative enforcement proceeding in 1989.

Even though Hoeck's state court case was resolved in favor of the City, he ignored the order to demolish the building. Thereupon, Portland City Council directed the City's Bureau of Buildings to hire a contractor to raze the Bridgeport. The work was to commence on May 17, 1991. On May 15, 1991, however, the Federal Deposit Insurance Corporation (FDIC) petitioned the Multnomah Circuit Court for a writ of mandamus and injunction preventing the destruction. *State ex rel Federal Deposit Insurance Corporation v. City of Portland*, Multnomah County Circuit Court No. 9105-03202. FDIC claimed that the City's action was improper because the FDIC had never received official notice of the numerous hearings involving the Bridgeport's fate. (FDIC had actual notice of the proposed demolition of the building in August, 1990, but did not seek judicial intervention until May, 1991. *State ex rel Federal Deposit Insurance Corporation v. City of Portland*, Memorandum Opinion of Judge Thomas L. Moultrie, September 3, 1991.)

The Circuit Court took FDIC's petition under advisement and demolition was delayed. In September, 1991, the Circuit Court concluded that under the City Code, FDIC should have received notice of the hearings before the Hearings Officer. The court therefore issued a writ of mandamus, enjoining demolition of the Bridgeport until FDIC was accorded an opportunity for administrative hearing. *Id.*

The City forthwith convened a sixth hearing before the Hearings Officer on October 4, 1991, at which FDIC appeared to argue its interests, represented by counsel. The

parties stipulated as follows, as stated by one of the Building Bureau officials in attendance at the hearing:

> I believe that both parties are willing to stipulate that the building remains essentially unchanged since the last hearing. That there has been no reconstruction or demolition ... with the exception that the plywood boards have been taken down and replaced with steel shutters. That, like any other securing system, they are going to require regular inspection and maintenance to keep people from breaking in, but the building is secure at this date. I think the City is also willing to stipulate that the building is structurally sound in the sense that its is not in danger of collapse due to structural weakness at this point.

Transcript of Oct. 4, 1991 Hearing, contained in City's Court of Appeals' Supplemental Excerpt of Record at 202.

FDIC asked that the building not be demolished, holding out the hope that Hoeck might yet obtain financing to complete the Bridgeport project. FDIC suggested, instead, that the Bridgeport should be "warehoused" under the appropriate City code provision that allowed warehousing of vacant structures.[4]

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[4]Portland City Code § 24.55.500 provides as follows:

> When the Director [of the Buildings Bureau] determines that a structure is suitable, due to its historic designation or other significant features, that owner may be permitted to warehouse such structure...for a period of up to 30 months. An extension for one further period of 1 year may be

The Hearings Officer concluded that the structure did not meet the standards for warehousing vacant buildings. Noting that the building was a "visual blight" on the neighborhood, a decrepit "monolith towering several stories into the air," the Hearings Officer rejected warehousing the building because "not only are there large holes in the roof, there is no roof. There are holes in the exterior walls [and] the glazing is not intact...." Transcript of October 4, 1991 Hearing, City's Supplemental Excerpt of Record at 246. The Hearings Officer went on to reaffirm his earlier decision that the structure should be demolished. Petitioner's Appendix, F-16 to F-18.

The FDIC did not appeal that decision. Hoeck, however, sought another Writ of Review, in which he again challenged the order as violative of his due process rights and in which he again failed to suggest that the order constituted a "taking." The Multnomah County Circuit Court upheld the Hearings Officer's final order in a judgment entered July 20, 1992. Petitioner's Appendix, E-3 to E-4. Hoeck appealed that determination to the Oregon Court of Appeals. The appeal was dismissed January 8, 1993, after Hoeck had failed to file any brief with the Court of Appeals.

The Bridgeport Hotel was finally demolished by the City in the summer of 1992, more than three years after the City filed its first complaint against the structure. Petitioner's Appendix, C-4. Hoeck filed his action against the City in

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permitted by the Director, provided that the condition of the warehoused structure is determined by inspection to be satisfactory.

federal district court on January 26, 1993.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Court should reject the petition because Hoeck seeks review of a Fifth Amendment issue that was not before the Ninth Circuit and is not, therefore, properly before this Court.

Hoeck asks this Court to review the legality of the City's demolition of the Bridgeport Hotel under the Takings Clause of the Fifth Amendment to the United States Constitution.[5] Although his petition is divided into several subsections, he argues in each only that the City's action constituted a taking for which compensation must be paid. But Hoeck did not present the Ninth Circuit with a Fifth Amendment claim.[6]

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[5] Although Hoeck's version of the Questions Presented is opaque, the text of his Petition focuses exclusively on the Fifth Amendment taking issue. In each separate argument for the grant of certiorari, Hoeck refers repeatedly to "takings," "compensation," or the "Takings Clause of the Fifth Amendment." See Petition at pages 9, 10, 11, 12, 13, 14, 15, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27.

[6] Hoeck's complaint alleged a deprivation of civil rights under 42 USC § 1983. His first claim for relief alleged that the City's dangerous and abandoned building ordinance was applied to Hoeck "in violation of Hoeck's rights under the Fifth and Fourteenth Amendments of the United States Constitution" because it allowed the "uncompensated demolition" of Hoeck's building. As his third claim for relief Hoeck also alleged that the City's action constituted inverse

For this reason, the Ninth Circuit did not render a Fifth Amendment decision this Court can review.[7]

Hoeck does not, in fact, contend that the Ninth Circuit had a Fifth Amendment claim before it. To the contrary, he admits, as he must, that the Ninth Circuit's inverse condemnation "decision ... [was] made under Article I, section 18 of the Oregon constitution...." Petition for Certiorari at 13. Having made this admission, however,

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condemnation for which compensation was due, but he cited no federal or state constitutional provisions in support of that claim.

In its motion for summary judgment against Hoeck's suit, the City argued, to begin with, that the district court should not assert jurisdiction over what appeared to be a Fifth Amendment taking claim in Hoeck's complaint. The district court had no jurisdiction over that claim under this Court's ruling in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), requiring exhaustion of state inverse condemnation remedies prior to seeking federal relief under the Fifth Amendment. Faced with the City's motion, Hoeck conceded the point. *Hoeck said that his complaint did not raise a Fifth Amendment claim* and asked the court to treat his federal civil rights claim as one alleging, instead, a violation of the Fourteenth Amendment's substantive due process protections. See discussion by district court, Petitioner's Appendix, C-7 to C-9.

[7] The federal question dealt with by the Ninth Circuit opinion was based on the doctrine of "substantive due process." The Ninth Circuit's substantive due process decision was unremarkable. The Court of Appeals applied a legal standard fully consistent with this Court's decisions and those of other Circuit courts. See, Ninth Circuit opinion citing *Albright v. Oliver*, ____ U.S. ____; 114 S.Ct. 804; 127 L.Ed.2d 14 (1994); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Petitioner's Appendix, A-13 to A-15.

Hoeck then seeks to bootstrap his way past the jurisdictional hurdles to raising a federal Fifth Amendment claim at this late date. According to Hoeck, since the Ninth Circuit cited federal Fifth Amendment cases in construing the Oregon constitution, he should be able now to transform a case about Oregon law into a federal constitutional case. Petition for Certiorari at 13.

Hoeck's petition simply does not present a justiciable federal question. This Court should not grant certiorari merely to issue an advisory opinion on how lower courts should use its Fifth Amendment jurisprudence when interpreting state constitutions.

II. Even if there were a Fifth Amendment takings issue in this case, the facts of this case do not present the issue as Hoeck frames it.

Even if there were a Fifth Amendment takings issue in this case, it would not be the one Hoeck tries to present. Hoeck tells the Court that the issue is whether a municipality can demolish a private building without compensation because it "is merely unsightly or unoccupied."

As the more complete statement of the case contained in this brief in opposition reveals, however, the facts of this case do not present the question Hoeck poses. The City of Portland demolished Mr. Hoeck's Bridgeport Hotel only after it had stood vacate and open to the elements for six years, after a Hearings Officer had repeatedly found that it was a safety hazard, after Hoeck had violated City orders to secure and renovate the building, after the City repeatedly delayed the building's demolition to allow Mr. Hoeck time to complete work on the structure, and after Oregon courts

twice reviewed and upheld the City's orders.

Finally, before the last of six administrative hearings granted Hoeck over a three year period, Hoeck secured the building's carcass with steel shutters so that it no longer constituted an immediate threat to public safety. The City Hearings Officer at that point ordered the demolition of the building as an "abandoned structure." The demolition occurred ten months later.

Despite Mr. Hoeck's suggestion to the contrary, this case does not present the issue of whether governments have the power to demolish private buildings solely for aesthetic reasons. This is not a case about an ugly building. This is a case about a property owner's six-year refusal to comply with municipal codes properly designed to protect the health, safety and welfare of the community.

CONCLUSION

For the foregoing reasons, the City of Portland urges the Court to deny Hans Hoeck's petition for certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,

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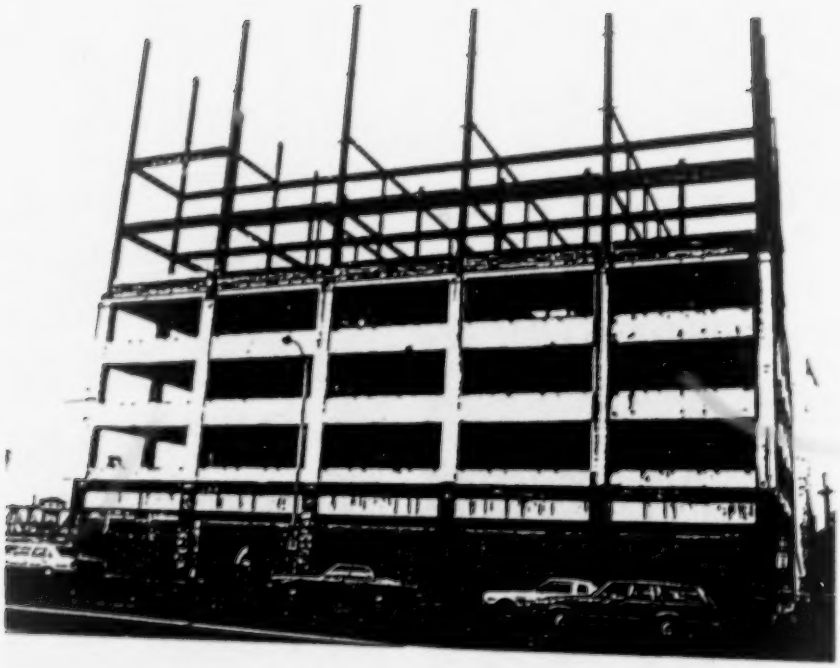
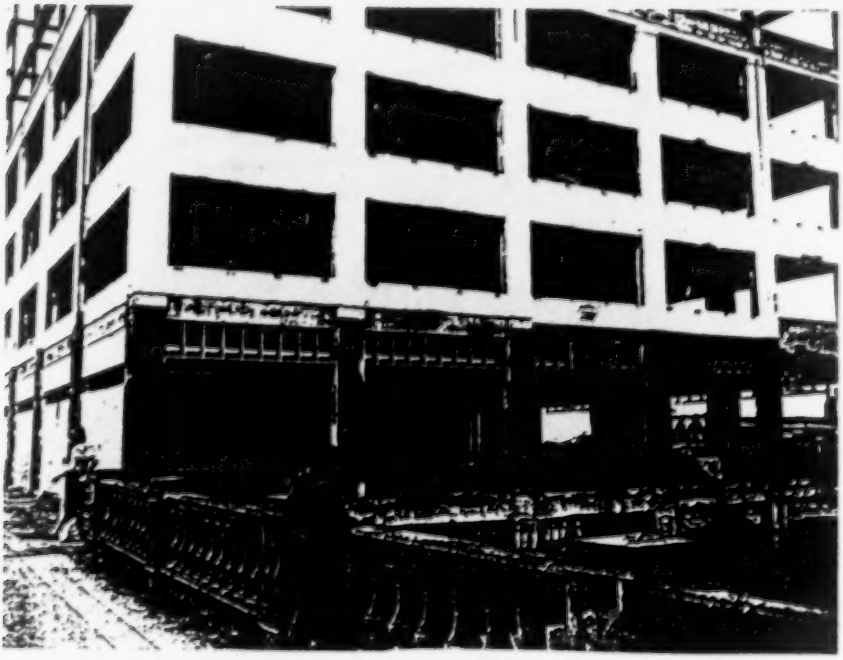
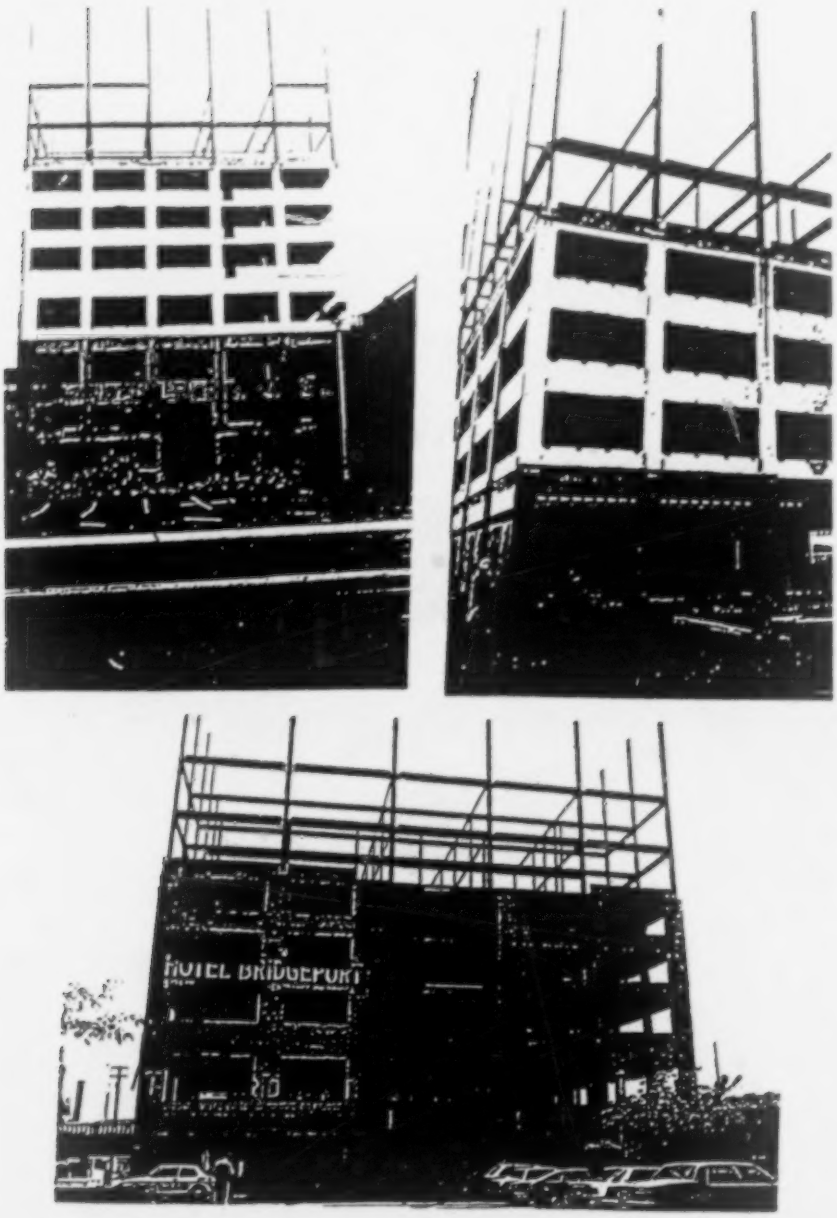
APPENDIX






HOTEL BRIDGEPORT

REPLY

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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2. The city demolished the Bridgeport Hotel because it was unsightly and unoccupied, and not because it had ever been determined to be a private, common-law nuisance. 6

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PETITIONER'S REPLY MEMORANDUM

The City of Portland, in its opposing brief in No. ~~94~~ 95-748, contends this Court may not review the decision of the Court of Appeals for the Ninth Circuit to determine if the city's demolition of the Bridgeport Hotel was an unconstitutional taking of Mr. Hoeck's private property without just compensation under the Fifth and Fourteenth Amendments to the United States Constitution. It bases that contention on the assertion that Mr. Hoeck's Federal takings claim was neither raised nor decided below. The city also contends that this Court should not review the Ninth Circuit's decision because the hotel was demolished, not because it was merely unsightly, but because it was found in violation of city codes intended to protect the health, safety and welfare of

the city. Both contentions misstate the facts in the record and misconstrue the applicable law.

1. The Federal takings claim was raised at every level below, but did not become ripe for decision until the Ninth Circuit affirmed the grant of Summary Judgment by the District Court.

The city argues: "The Court should reject the petition because Hoeck seeks review of a Fifth Amendment issue that was not before the Ninth Circuit and is not, therefore, properly before this Court." Brief in Opp. at 10. The city's argument misconstrues the record below, and disregards the fact that the city conceded to the Ninth Circuit that Mr. Hoeck consistently had asserted, and was continuing to assert, a Federal takings claim. Contrary to the city's assertions in its brief in opposition, the record of the proceedings below shows that the Federal takings issue was raised and decided in the District Court, and was raised and decided again in the Ninth Circuit.

At oral argument, the Ninth Circuit panel was concerned that the District Court lacked jurisdiction over Mr. Hoeck's state takings claim, brought pendent to his substantive due process claim asserted under the Fourteenth Amendment. In response to a question by the court, counsel for the city stated: "[T]he tenor of this case and the way plaintiff has prosecuted it, has always been on the takings issue; both the state law takings claim and the federal takings claim." Transcript at 13, *Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995). Having asserted to the Ninth Circuit that Mr. Hoeck was asserting a Federal takings claim, the city cannot now argue that claim was not before the Ninth Circuit.

At the trial court, Mr. Hoeck raised a Federal takings claim. When Mr. Hoeck moved for Partial Summary Judgment in the District Court, he stated, as a basis for his motion, that "the City's actions constitute a taking of Hoeck's private property for public use without compensation, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States . . .." Excerpts of Record, CR 11 at 5, *Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995). The city, when it moved for summary judgment in the District Court, asserted that "The City's demolition of the Bridgeport did not constitute a "taking" of Hoeck's property under the United States . . . Constitution[s]." Defendant's Memorandum in Support of Motion for Summary Judgement at 10, *Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995) (citing, *inter alia, Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), *Kaiser Aetna v. United States*, 444 U.S 164 (1979)).

When the District Court rendered its decision on Mr. Hoeck's pendent state takings claim, it also made a decision that construed and applied the Fifth Amendment:[1] "[P]laintiff has not been deprived of 'all economically beneficial or productive use' of his property." *Id.* at App. C-10 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. ____, 112 S.Ct. 2886, 2893 (1992)). "I further find that defendant's

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[1] The District Court, in making a state constitutional decision, referred to *Shaffer v. City of Winston*, 33 Or. App. 391, 394, 576 P.2d 823 (1978), and concluded "it was reasonable for defendant to conclude that the public interest would not be served by permitting plaintiff to keep the building on his property in its perpetually uncompleted state." Pet. for Cert., App. C-12.

actions did not frustrate plaintiff's 'distinct investment-backed expectations' concerning his property." *Id.* at App. C-12 (citing *Penn Central*, 438 U.S. at 124).

Thus, under no circumstances can it be said that the District Court did not make a decision under the Fifth Amendment, as interpreted by this Court's Fifth Amendment jurisprudence. It concluded there was no taking under the Fifth Amendment, and also concluded the city's demolition did not violate Article I, section 18 of the Oregon Constitution, and thus was not a state taking.

The Federal takings claim was preserved before the Ninth Circuit. When Mr. Hoeck filed his brief with the Ninth Circuit, he again argued that the city's demolition violated the Fifth Amendment: "The City's Demolition of the Bridgeport Hotel constitutes a taking of property for which compensation is due [under] [t]he Takings Clause of the Fifth Amendment . . .." Brief for Appellant at 10, *Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995). The city again responded directly to this argument: "The City's demolition of the Bridgeport did not constitute a "taking" of Hoeck's property under the United States . . . Constitution[s]." Brief of Appellee at 11, *Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995).

Like the District Court, the Ninth Circuit based its conclusions on both state takings law and Fifth Amendment jurisprudence. The court first concluded that "The demolition of the Bridgeport Hotel was not a physical taking for public use." Pet. for Cert., App. A-17 (citing *inter alia Yee v. Escondido*, 503 U.S. 519 (1992), *Lucas*, *supra*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419

(1982), *Kaiser Aetna*, *supra*, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871), and *Bowditch v. Boston*, 101 U.S. 16 (1880))[2].

The Ninth Circuit then relied on state court decisions to conclude that Mr. Hoeck had not suffered a regulatory taking under the Oregon Constitution. Critical to that determination, however, was the court's conclusion that "the regulation has not interfered with Hoeck's reasonable, investment-backed expectations. Under the law at the time Hoeck took title, he had no right to use his property as an abandoned structure." Pet. for Cert., App. A-20 (citing, *inter alia*, *Lucas*, *supra*). Thus, the Ninth Circuit made a decision on both the state and Federal takings claims.

Mr. Hoeck preserved that Federal takings claim when he petitioned the Ninth Circuit for reconsideration and suggested a rehearing en banc. "The panel's construction of Article I, section 18 of the Oregon Constitution . . ., to find no taking of Mr. Hoeck's property by the city, was inconsistent with the U.S. Supreme Court's construction of the Fifth Amendment's Takings Clause." Petition for Rehearing with Suggestion for Rehearing En Banc at 3, *Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995).[3]

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[2] The Court, in making this holding, also relied on one state case, *Hawkins v. City of LaGrande*, 315 Or. 56, 843 P.2d 400 (1992) (physical occupation by flooding). It appears, at least for purposes of determining whether the city's demolition of the Hotel was a permanent physical occupation, the court assumed that decisions under both the state and Federal constitutions were identical.

[3] The rejection of this argument by the Ninth Circuit is similar to the rejection of the argument of the appellant by the California Court of Appeal in *First*

The city's argument also misapprehends the fundamental principle of ripeness of Federal takings claims set down by this Court in *Williamson Co. Regional Planning v. Hamilton Bank*, 473 U.S. 172 (1985). Mr. Hoeck's Federal takings claim, even though raised to both the District Court and the Ninth Circuit, did not become ripe until the Ninth Circuit had affirmed the District Court's denial of just compensation sought in Mr. Hoeck pendent state constitutional takings claim. In *Hamilton Bank,* Justice Blackmun, writing for the Court's majority, held that "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation . . .." *Id.* at 196. Thus, it was only when the Ninth Circuit upheld the District Court's denial of Mr. Hoeck's takings claim under the Oregon Constitution that his Federal claim became ripe for adjudication.

2. The city demolished the Bridgeport Hotel because it was unsightly and unoccupied, and not because it had ever

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English Evan. Luth. Ch. v. Los Angeles Cty., 482 U.S. 304 (1987). As in the instant case, when the *First English* appellant sought review in this Court, the appellee argued "that appellant has failed to preserve for review any claim under federal law." The appellant had contended that this Court's Fifth Amendment decisions showed the state's constitutional law was in violation of the Federal Constitution. This Court concluded:

> The Court of Appeal, by applying the state rule . . . to dismiss appellant's action, rejected on the merits the claim that the [state] rule violated the United States Constitution. This disposition makes irrelevant for our purposes any deficiencies in the complaint as to federal issues.

482 U.S. at 313 n.8 (construing jurisdiction under 28 U.S.C. § 1257).

been determined to be a private, common-law nuisance.

The city argues that "This is a case about a property owner's six-year refusal to comply with municipal codes properly designed to protect the health, safety and welfare of the community." Brief in Opp. at 13. The city's underlying contention appears to be that the Hotel was a health and safety hazard at the time it was demolished. The city's Statement of the Case in its Brief in Opposition purports to support that contention. However, that assertion, and its supporting factual statements, misstates the record in this case.

The city disregards the fact that, on the very day that demolition of the Hotel commenced, the Circuit Court of the State of Oregon for Multnomah County, found that "there was nothing [about the Hotel] in the nature of a public nuisance. . . . There was nothing . . . that counsel pointed out to the Court that indicated that there was any finding that the property was now a danger or health danger or structural danger of collapse that endangered anyone . . .." *Hoeck v. Board of County Commissioners*, No. A9201 - 00164, slip op. at 15 (Multnomah County Cir. Ct., July 27, 1992).[4]

Thus the city cannot now contend that, at the time of demolition, the Bridgeport Hotel was a private, common-law nuisance. Mr. Hoeck had corrected every health and safety

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[4] This conclusion was rendered by Circuit Judge Roth after he had granted Mr. Hoeck an additional 120 days to redeem the County's tax lien on the Hotel. The city proceeded with demolition of the Hotel notwithstanding Judge Roth's order granting the additional time for redemption. *See* Pet. for Cert. at 5 n.2. Judge Roth, after stating he believed the city to be "in contempt of court," rhetorically asked the city attorney "What value is there for redemption if the property is destroyed?" *Hoeck v. Board of County Commissioners*, slip op. at 14.

violation identified by the city, and the city indeed agreed that he had done that. Brief in Opp. at 8. Instead, the city demolished the structure because it was "abandoned," which the city defines as a "structure that has been vacant for a period in excess of 6 months." P.C.C. 24.15.020 (reproduced in Pet. for Cert., App. G-1). The city contends that Mr. Hoeck's failure was to comply with ordinances adopted "to protect the health, safety and welfare of the community," Brief in Opp. at 13.

What the city really means is that it believes it is constitutionally permissible for it to demolish any building that has been vacant more than six months, merely because the building developer has been unable to obtain financing within a time schedule set arbitrarily by city officials.[5] In the end, it appears that Mr. Hoeck's failure to obtain the requisite financing when the city believed he should have was the basis for the city concluding the Hotel was "abandoned."[6]

Nor can the city conclude that it was acting under the "police power" to abate an imminent threat to the public

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[5] *See* Pet. for Cert., App. F-12 (city's Code Hearings Officer gives Mr. Hoeck from November 24, 1989 until February 10, 1990, to provide "Documentary evidence of sufficient committed financing to complete the structure."). The city also contends it did not proximately cause Mr. Hoeck to lose his financing in the first place. Brief in Opp. at 3 n.1. The city's contention overlooks the fact that Mr. Hoeck's lender, State Federal Savings and Loan, was declared insolvent by the F.S.L.I.C. after the city had suspended Mr. Hoeck's permits and before the city reissued permits to him on February 3, 1986. Excerpts of Record, CR 1 at 5, *Hoeck v. City of Portland*, 57 F.3rd 781 (9th Cir. 1995).

[6] The city's demand that Mr. Hoeck obtain and document alternative financing in an arbitrarily short time-frame, when obtaining financing had become burdensome, placed him at a disadvantage with respect to other developers with ready access to institutional financing.

health and safety. As the city notes, there were "six administrative hearings granted Hoeck over a three year period." *Id.* The city also catalogs the repeated efforts made by Mr. Hoeck to make the interim repairs to the structure to prevent it from being a health and safety hazard. *Id.* at 5-6. Over that three year period, Mr. Hoeck's efforts were successful. The city concedes that, at the end of that period, the Bridgeport Hotel "no longer constituted a threat to public safety." *Id.* Nonetheless, the city demolished the structure.

The city faults Mr. Hoeck for framing the issue in this case as whether it could demolish a building without compensation because it "'is merely unsightly or unoccupied.'" Brief in Opp. at 12 (quoting Pet. for Cert. at ii). However, in its Statement of the Case, the city sets forth that the demolition decision was upheld on the basis of the building being "'a visual blight' on the neighborhood, [and] a decrepit 'monolith towering several stories into the air . . . .'" *Id.* at 9 (citing Pet. for Cert., App. F-16 - F-18).

"This is not a case about an ugly building." Brief in Opp. at 13. Instead, and in spite of the city's Statement of the Case, this is a case about whether a building may be demolished without just compensation when the building has not been shown to be a heath or safety hazard - a private, common-law nuisance. The city, in its opposing brief, quotes from the record that, on October 4, 1991, just months prior to demolition, the city's Hearings Officer found that Mr. Hoeck had installed steel shutters and that "'the building is secure at this date." He added that he thought "the City is also willing to stipulate that the building is structurally sound. . . .'" Brief in Opp. at 8 (citation omitted).

The city, by its own representations, makes clear that the demolition of Mr. Hoeck's building was not necessitated by any emergency of the sort recognized by this Court in *Bowditch*, *supra* (destruction of houses in path of fire) or *Miller v. Schoene*, 276 U.S. 272 (1928) (destruction of trees to prevent spread of disease). It further acknowledges that the building was not a health or safety hazard at the time of demolition. Petitioner respectfully urges this Court to reject the city's argument that the uncompensated demolition of Mr. Hoeck's building is permissible merely because the city has an "abandoned" building ordinance "designed to protect the health, safety and welfare of the community." Brief in Opp. at 13.

3. Conclusion.

Based on the foregoing, the Petitioner respectfully requests that this Court grant the Petition for Certiorari, vacate the decision of the Ninth Circuit, and remand the matter back to the United States District Court for the District of Oregon.

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Respectfully submitted,

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